IN THE COURT OF APPEALS

FIRST APPELLATE DISTRICT OF OHIO

HAMILTON COUNTY, OHIO

NATALIE BECHTOL, Individually and as Executrix of the Estate of KENNETH L. BECHTOL, Deceased,	:	APPEAL NO. C-090164 TRIAL NO. A-0610890
Plaintiff-Appellant,	:	*JUDGMENT ENTRY.*
vs.	:	
STEPHEN W. WINHUSEN, M.D.,	:	
and	:	
GREATER CINCINNATI ASSOCIATED PHYSICIANS, INC.,	:	
Defendants-Appellees.	:	

We consider this appeal on the accelerated calendar, and this judgment entry is not an opinion of the court.[1]

Natalie Bechtol appeals from the trial court's entry of judgment in favor of Stephen Winhusen, M.D., and Greater Cincinnati Associated Physicians, Inc., ("GCAP") and from the trial court's entry denying her motion for judgment notwithstanding the verdict or for a new trial. We conclude that Bechtol's assignments of error do not have merit, so we affirm the judgment of the trial court.

On November 28, 2005, Kenneth Bechtol had a checkup appointment with Winhusen. Winhusen is a family-practice doctor with GCAP. Kenneth complained of a ten-pound weight loss, a decreased appetite, and edginess. On a questionnaire that he filled out before the appointment, Kenneth indicated that he was not sure if

[1] See S.Ct.R.Rep.Op. 3(A), App.R. 11.1(E), and Loc.R. 12.

he was suffering from depression. Winhusen questioned Kenneth about his health and learned that Kenneth had work-related stress and mild insomnia. Winhusen diagnosed Kenneth with mild depression and gave him a 35-day supply of the antidepressant Lexapro. Winhusen asked Kenneth to schedule a follow-up appointment in four weeks. On December 18, 2005, after exhibiting out-of-character behavior earlier in the day, Kenneth hung himself at home.

Kenneth's wife, Natalie Bechtol, filed a lawsuit against Winhusen and GCAP, claiming medical malpractice, lack of informed consent, loss of consortium, and wrongful death. The case was tried before a jury.

During the trial, Bechtol alleged that Winhusen's care of Kenneth fell below the standard required of primary-care physicians because he did not perform a suicide assessment of her husband, because he did not ask Kenneth if he had suicidal ideation, because he did not adequately warn him about the side effects of Lexapro, and because he did not closely monitor Kenneth after having provided him with Lexapro.

Bechtol presented the testimony of Dr. Susan McElroy, a board-certified psychiatrist and neurologist, Dr. Mace Beckson, a neurologist and psychiatrist, and Dr. Richard Lewan, a family-practice physician. Both McElroy and Beckson testified that family-practice doctors and psychiatrists shared the same standard of care when diagnosing and treating a patient with depression and that Winhusen had fallen below that standard of care. Lewan also testified that Winhusen had fallen below the standard of care.

Bechtol also presented evidence that patients who take Lexapro require close monitoring when they first begin to use the drug, due to concerns about increased suicidality. According to Bechtol, Winhusen did not properly inform Kenneth about all the risks, especially suicidality, involved with taking Lexapro.

In his defense, Winhusen testified that he had followed the standard of care in diagnosing and treating Kenneth. He testified that, after questioning Kenneth, he was not concerned that he was suicidal, so he did not ask him about suicidal ideation. He further testified that he believed that the question about suicidal ideation was not necessarily useful in diagnosing suicidality. According to Winhusen, he told Bechtol about the potential side effects of Lexapro. Winhusen testified that a follow-up appointment scheduled four weeks from the check-up was reasonable to monitor Kenneth's treatment. Dr. Barry Wendt, a board-certified internal-medicine physician, testified that, like family practice, internal medicine is a primary-care specialty, and that Winhusen's diagnosis and treatment of Kenneth had not fallen below the standard of care for primary-care physicians. Similarly, Dr. Steven Pariser testified that Winhusen had met the standard of care. Pariser, a board-certified psychiatrist who had also practiced as an obstetrician/gynecologist, testified that he was familiar with the standards of care for both primary-care physicians and psychiatrists. According to Pariser, the standards of care were different. Further, Pariser testified that it was reasonable for Winhusen to conclude that Kenneth was not suicidal when he saw him on November 28.

At the conclusion of the trial, the jury found in favor of Winhusen. Bechtol filed a motion for judgment notwithstanding the verdict or for a new trial. After a hearing on the motion, the trial court denied it. This appeal followed.

In her first assignment of error, Bechtol asserts that the trial court erred by giving a misleading standard-of-care instruction to the jury. We must review the totality of the jury charge to determine whether a portion of it was harmful or prejudicial.[2] And our review of the trial court's refusal to give Bechtol's requested

[2] See *Schade v. Carnegie Body Co.* (1982), 70 Ohio St.2d 207, 436 N.E.2d 1001.

instruction is limited to whether the refusal was an abuse of discretion, and if so, whether Bechtol was prejudiced by the refusal.[3]

With respect to the standard of care, the trial court instructed the jury as follows: "A specialist is a physician who holds himself out as specially trained, skilled, and qualified in a particular branch of medicine. Dr. Winhusen's specialty in this case is family medicine. The standard of care for a physician in the practice of a specialty is that of a reasonable specialist practicing in that same specialty, regardless of where he or she practices. A specialist in any branch has the same standard of care as all other specialists in that branch. If you find by the greater weight of the evidence that Dr. Winhusen failed to meet this standard of care, then you shall find that he was negligent." The trial court refused to include Bechtol's requested instruction that "where fields of medicine overlap and more than one type of a practitioner may perform the diagnosis and treatment, a medical witness may qualify as an expert, even though they do not practice in the same specialty as the defendant."

Bechtol acknowledges that the instruction given by the court was a correct statement of the law.[4] But she contends that because Winhusen initially challenged whether McElroy should have been permitted to testify as an expert and because Winhusen challenged the weight to be given McElroy and Beckson's testimony about the applicable standard of care, the jury was misled without the additional instruction that she requested.

Bechtol's requested instruction was based on the Ohio Supreme Court's holding in *Alexander v. Mt. Carmel Medical Center*.[5] The requested instruction addressed whether McElroy and Beckson qualified as experts. That decision was made by the trial court when it allowed both doctors to testify. The instruction does

[3] *Rommes v. Southwest State Regional Transit Auth.* (Mar. 29, 1995), 1st Dist. No. C-940120.
[4] See *Bruni v. Tatsumi* (1976), 46 Ohio St.2d 127, 346 N.E.2d 673, paragraph one of the syllabus.
[5] (1978), 56 Ohio St.2d 155, 383 N.E.2d 564.

not clarify the law that the jury was to apply to the case. We conclude that the trial court did not err when it instructed the jury on the standard of care, and that the trial court did not abuse its discretion in refusing to give Bechtol's requested instruction.[6]

Bechtol's second assignment of error is that the trial court erred when it refused to allow Dr. Catherine Willmore to testify with respect to the standard of care. We disagree.

Willmore is a pharmacologist. The trial court permitted Willmore "to testify as a pharmacologist about labeling, warnings, the importance of product information, the labeling of drugs, what it means, how it's done, why it's done." But the court did not permit Willmore to testify about the standard of care. The trial court's decision was in accordance with Evid.R. 601(D), which makes a witness incompetent to testify under the following circumstance: "[a] person giving expert testimony on the issue of liability in any claim asserted in any civil action against a physician * * * arising out of the diagnosis, care, or treatment of any person by a physician * * *, unless the person testifying is licensed to practice medicine * * *." Bechtol's claims against Winhusen were based on actions that allegedly arose out of Winhusen's diagnosis, care, and treatment of her husband. We conclude that the trial court properly excluded Willmore's testimony about the standard of care. The second assignment of error is without merit.

The third assignment of error is that the trial court erred when it denied Bechtol's motion for judgment notwithstanding the verdict ("JNOV") or for a new trial.

Our review of the trial court's denial of the motion for JNOV is de novo. "The evidence adduced at trial and the facts established by admissions in the pleadings and in the record must be construed most strongly in favor of the party against whom the motion is made, and, where there is substantial evidence to support his

[6] See, also, *Zanetti v. Lieberman* (Nov. 14, 1994), 5th Dist. No. CA 9560.

side of the case, upon which reasonable minds may reach different conclusions, the motion [for JNOV] must be denied."[7] Construing the evidence most strongly in Winhusen's favor, we hold that there was substantial evidence to support a conclusion that Winhusen had not acted negligently in his care of Kenneth. The trial court properly denied the motion for JNOV.

Bechtol moved in the alternative for a new trial under Civ.R. 59(A)(6) and (9). We conclude that the judgment was sustained by the weight of the evidence, so the trial court properly denied the motion for a new trial under Civ.R. 59(A)(6). Bechtol's motion under Civ.R. 59(A)(9) was based on issues in the assignments of error we have already addressed. Because we have concluded that those assignments of error are without merit, we conclude that the trial court properly denied the motion for a new trial under Civ.R. 59(A)(9). The third assignment of error is overruled.

Therefore, we affirm the trial court's judgment.

A certified copy of this judgment entry is the mandate, which shall be sent to the trial court under App.R. 27. Costs shall be taxed under App.R. 24.

HILDEBRANDT, P.J., SUNDERMANN and **DINKELACKER, JJ.**

To the Clerk:

Enter upon the Journal of the Court on February 24, 2010

per order of the Court _____.

Presiding Judge

[7] *Posin v. A.B.C. Motor Court Hotel, Inc.* (1976), 45 Ohio St.2d 271, 275, 344 N.E.2d 334.